Supreme Court, U.S.
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No. 98-1613

In The Supreme Court of the United States

October Term 1998

ANN DOE AND JOHN DOE,
parents and next friends of TOM DOE,
Petitioners,

v.

BOARD OF EDUCATION OF BALTIMORE COUNTY,
a Body Corporate and Politic of the State of Maryland; ANTHONY G. MARCHIONE, Officially, Superintendent,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF IN OPPOSITION

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1998

QUESTION PRESENTED

Whether a parent who is also an attorney representing his own child, who prevails on the merits of a due process hearing conducted pursuant to the Individuals With Disabilities Education Act, 20 U.S.C. § 1400 et seq. (hereinafter, "IDEA"), is entitled to attorneys' fees pursuant to Section 1415(e)(4)(B) of that statute.

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Respondents Board of Education of Baltimore County (hereinafter, "the Board") and Anthony G. Marchione, Superintendent of Schools, by their undersigned counsel, oppose the Petition for a Writ of *Certiorari* to review the judgment of the United States Court of Appeals for the Fourth Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 165 F.3d 260. The opinion of the district court is unpublished and reprinted at App. A-12 through A-16 of the Petitioner's Petition for Writ.

JURISDICTION

The judgment of the Court of Appeals was entered on December 10, 1998 (Pet. App. 11). Petitioner's Petition for Rehearing and Suggestion for Rehearing En Banc was denied by the Court of Appeals on January 5, 1999. The petition for a writ of certiorari was filed on April 7, 1999. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The relevant provisions of IDEA are set forth at Pet. 1-2.

STATEMENT OF THE CASE

Petitioners properly state in their Petition that their son, Tom Doe, who is currently 7 years of age, was diagnosed as suffering from a disability known as autism, and that as a result of research conducted by Tom's mother the Petitioners determined that they wished for Tom to receive services provided by the Respondents which differed

in kind and in intensity from those services which the Respondents were prepared to provide for Tom. As the Petition explains, the Petitioners demanded that Respondents fund a program known as "Lovaas" therapy that involves discrete and intensive behavior modification which is intended to increase the communicative and interpersonal skills for certain autistic children. Respondents, however, believed that the "Lovaas" program was of questionable efficacy and were instead fully prepared to offer the Petitioners a different program with comparable types of services. Petitioners were dissatisfied with Respondents' proffered services for their child, and therefore proceeded to a due process hearing before a local hearing officer, pursuant to their rights under the IDEA, 20 U.S.C. § 1415(B). The local hearing officer ruled in Respondents' favor, finding and concluding that Respondents had offered Tom a sufficient program in compliance with the requirements of IDEA that he be provided with a "free appropriate public education." 20 U.S.C. §§ 1401(a)(18) and 1412(2)(B).

Pursuant to Maryland's administrative appeal process then in place, the Petitioners appealed the decision of the local hearing officer to a 3-member hearing review board which was convened under the auspices of the Maryland Office of Administrative Hearings. Following a *de novo* hearing, that body reversed the decision of the local hearing officer and ordered Respondents to reimburse the Petitioners for expenses they had incurred in providing Tom with "Lovaas" therapy in their home prior to and during the course of the administrative dispute. In response to a request by the Petitioners that, as prevailing parties under IDEA, they be afforded their attorneys' fees, the hearing review board concluded that, although unauthorized to make such awards -- that being strictly within the province of the courts, pursuant to 20 U.S.C. § 1415(e)(4)(B) -- the fact that Tom Doe was represented by his own father, who happened to be an attorney admitted to practice in the State of Maryland, precluded an award of fees, pursuant to the sole ruling on

this point made by the U.S. District Court for the District of Maryland, in Rappaport v. Vance, 812 F. Supp. 609 (D. Md. 1993), appeal dismissed 14 F.3d 596 (4th Cir. 1994).

A. THE DISTRICT COURT'S RULING

Still insistent upon obtaining attorneys' fees -- which Petitioners calculated at $110,000.00 (Pet. App. 13) -- the Petitioners sought enforcement of their claim in the United States District Court for the District of Maryland. Included in Petitioners' fee petition to the United States District Court were line items seeking reimbursement from the Respondents for such matters as "consultations" between John Doe the husband-father-attorney and his "client" Ann Doe, who happened to be John Doe's wife. A "client fee agreement" between John Doe and his wife Ann was submitted to the District Court, which identified Tom's mother, rather than Tom, as the "client."

In a Memorandum Opinion and Order issued on December 27, 1997, Judge William M. Nickerson of the District Court rejected the Petitioners' claim for attorneys fees. Relying upon the District Court's prior ruling in Rappaport v. Vance, *supra*, the Court concluded that "[w]hile there may be ways in which the award of fees to a parent-attorney might advance the goals of the IDEA, the Court is of the opinion that, all things considered, the congressional purpose in enacting the IDEA is best served by denying the award of fees in situations such as this." (Pet. App. 14.)

B. THE DECISION OF THE COURT OF APPEALS

On appeal, the Court of Appeals for the Fourth Circuit affirmed. In so ruling, the Court largely relied upon this Court's decision in Kay v. Ehrler, 499 U.S. 432, 111 S. Ct. 1435 (1991), which "held that a *pro se* plaintiff who is an attorney cannot be awarded attorney's fees under the fee-

shifting provisions of the Civil Rights Fees Awards Act, which contains language similar to the IDEA provision. *See* 42 U.S.C. § 1988(b) (West Supp. 1998) . . . . The Kay court reasoned that the term 'attorney' in the fee-shifting provision 'assumes an agency relationship, and it seems likely that Congress contemplated an attorney-client relationship as the predicate for an award under § 1988.' Kay, 499 U.S. at 435-36, 111 S. Ct. 1435." 165 F.3d at 262.

While concluding that the interests of parents and children under IDEA are sufficiently different and distinct so as to negate the notion that a parent who represents his or her child is effectively *pro se*, 165 F.3d at 262-263, the Court of Appeals nonetheless went on to find that, "[l]ike attorneys appearing *pro se*, attorney-parents are generally incapable of exercising sufficient independent judgment on behalf of their children to ensure that 'reason, rather than emotion' will dictate the conduct of the litigation." 165 F.3d at 263, *citing* Kay, *supra*, 499 U.S. at 437, 111 S. Ct. at 1435. As the Court then observed:

> Certainly the danger that a child's meritorious claim will be ineffectively prosecuted by an irrationally emotional attorney-parent is at least equal to the danger that the meritorious claim of a pro se lawyer, will be bungled without the assistance of an independent attorney.

165 F.3d at 263.

The Court then proceeded to describe the very problems encountered by the parent-attorney in this case who, due to his utter lack of competence and understanding of the dynamics of the nation's special education laws, failed to timely submit supporting documents and a witness list to Respondents prior to his initial due process hearing, which precluded him from introducing evidence under the law's

procedural regulations. Thus, the Court reasoned, he was compelled to retry the case before another adjudicatory authority, thereby prolonging the proceedings and increasing both Petitioners' and Respondents' resultant costs of litigation. His admitted unfamiliarity with the Federal Rules of Civil Procedure further resulted in his failure to "preserve" his right in District Court to seek pre- and post-judgment interest from the District Court. Id. "More experienced counsel," opined the Court of Appeals, "would likely have alleged the right to interest in the complaint and sought costs pursuant to 20 U.S.C. § 1415(e)(2)." Id. Petitioner's pitiful lack of experience as a special education litigator pointed out the very reason why the statute contained a fee-shifting provision in the first place, i.e., to encourage parents, including those who happen to practice law, to obtain the services of specialized attorneys knowledgeable in this highly complex field of jurisprudence.

The Court of Appeals next looked at the fact that loving parents who care deeply about their own children, including attorneys, need no incentive in the form of attorneys' fees in order to "ensure a parent's efforts on behalf of his child, but" awarding fees to a parent-litigant "might well lessen the chance that a disabled child would have the benefit of legal services from an independent third party. In a way," held the Court of Appeals, awarding attorneys fees to parents "would 'compound' the "child's handicap simply because his parent is an attorney.'" 165 F.3d at 264. Essentially, the Court expressed a concern that children's rights would be compromised by emotion-laden, not fully competent attorney-parents seeking to represent their interests -- the precise facts confronting the Court in this case. Accordingly, the Court of Appeals denied Petitioners' fee request, concluding:

> [T]he Kay Court held that encouraging independent representation by prohibiting statutory awards to *pro se* attorney-plaintiffs

> furthered the fee-shifting statute's purpose of encouraging effective prosecution of meritorious claims.

165 F.3d at 265, *citing* Kay, *supra*, 499 U.S. at 437, 111 S. Ct. at 1435.

ARGUMENT

I.

The Petitioner's Petition is largely an indictment not of the sound reasoning of the District Court and Court of Appeals in this case, but rather, of public schools in general. Painting the Respondents as greedy, blind bureaucrats with little interest in their son's recovery from the ravages of autism (*see, for instance,* Pet. 6, 26) , the Petitioners essentially urge this Court to grant their Writ in order to insure that autistic children will someday be "cured," rather than ignored and mistreated by public educators.

Of course, one must make a quantum leap in order to discern any causal connection between the Petitioners' receipt of attorneys' fees and the dramatic changes in public schools' approaches to the education of autistic children insisted upon by the Petitioners. Petitioners' repetitive contention that the direct result of the success of their administrative appeal was a "systemic change wherein the school district began offering the child's educational program to other similarly situated children suffering from autism" (Pet. 14), is entirely unsupported by any record evidence, as reflected in the absence of any reference to the record following such a sweeping assertion. Even if that were the case -- which it markedly is not -- the Does cannot nonetheless justify a fee award in light of this Court's ruling in Kay v. Ehrler, *supra*.

In Kay, a law enacted by the State of Kentucky prohibited the plaintiff, an attorney representing himself,

from appearing on the ballot as a candidate for President of the United States. He successfully sued the State, obtaining a ruling from a federal court that the law was unconstitutional. Nonetheless, Kentucky first repealed, then reenacted an identically-worded statute, once again forcing the plaintiff to go back to court, where he obtained the same relief. This time, the plaintiff requested attorneys' fees, which were denied him even though it was apparent that the State, in an action bordering on bad faith, had reenacted a bad law which had the effect of chilling the exercise of citizens' constitutional rights to seek higher office. Despite this compelling result, this Court was loath to award the plaintiff his attorneys' fees under 42 U.S.C. § 1988. This Court's rejection of the plaintiff's fee request was predicated upon the very same reasoning advanced by the Court of Appeals in the instant case, that is:

> The question then is whether a lawyer who represents himself should be treated like other pro se litigants or like a client who has had the benefit of the advice and advocacy of an independent attorney.
>
> In the end, we agree . . . that the overriding statutory concern [in the fee-shifting law] is the interest in obtaining independent counsel for victims of civil rights violations. . . . [W]e think Congress was interested in ensuring the effective prosecution of meritorious claims.
>
> Even a skilled lawyer who represents himself is at a disadvantage in contested litigation. Ethical considerations may make it inappropriate for him to appear as a witness. He is deprived of the judgment of an independent third party in framing the theory

> of the case, evaluating alternative methods of presenting the evidence, cross-examining hostile witnesses, formulating legal arguments, and in making sure that reason, rather than emotion, dictates the proper tactical response to unforeseen developments in the courtroom. . . .

499 U.S. at 435, 437, 111 S. Ct. at 1435.

Thus, contrary to Petitioners' argument, this Court in Kay was deeply concerned, not so much with questions of whether the plaintiff seeking fees for himself was unable to secure other counsel (Pet. 12-13), but with the lack of objectivity inherent in attorneys who represent themselves. Given this Court's well-founded apprehension that "reason," rather than "emotion," would "dictate the proper tactical response" to developments in a case, 499 U.S. at 437, 111 S. Ct. at 1435, thus sacrificing judgment that can only be truly independent if provided by a "third party," *Id.*, the Court of Appeals below quite reasonably concluded that a parent's emotion and lack of objectivity when it comes to his or her own child is no less evident, and indeed, may be even more intense. A parent's natural instincts to protect his or her child, at any and all costs, cannot help but leave reason behind, as reflected in Petitioners' resort to barely comprehensible rhetoric in its Petition to this Court about "Russian Roulette" and saving children's lives (Pet. 6, 26) in lieu of a cogent legal argument which is best left up to an independent, unemotional third party, rather than Tom's own flesh and blood.

II.

One particular concern which the Court of Appeals failed to address, but which looms large in this area of the law should this Court grant Petitioners' Petition and reverse the ruling of the Court of Appeals, is the very real risk that parent-attorneys, armed with the power to seek attorneys' fees upon prevailing in a due process dispute with their local school system over the education of their children, would make a virtual career of disputing their child's educational services each and every year, from grades kindergarten through age 21 when services under IDEA finally come to an end. Thus, in essence, a law interpreted so as to permit parent-attorneys to recover their fees could invite over a decade of litigation for each child, motivated not necessarily by the best interests of the child, but instead by the expectation that from time to time the parent-attorney will "prevail" and obtain attorneys' fees, courtesy of the community's taxpayers. Thus, there then becomes a genuine incentive under the law to litigate meritless claims, hoping that one or more such claims will eventually result in a "win" warranting a significant fee award.

Unlike the arrangement John Doe made with his wife Mary, most bona fide independent attorneys who represent parents and their children in IDEA litigation with our nation's public schools are not retained on a "contingency" basis, but instead charge their clients an hourly fee for their services, subject only to reimbursement in the event they eventually prevail and obtain a fee award pursuant to 20 U.S.C. § 1415(e)(4)(B). But what parent, who also happens to practice law, is going to enter into such an arm's length relationship with his or her own spouse and/or child, thereby collecting a fee on an hourly basis subject only to reimbursement from the local school district if the case proves successful? Respondents doubt that Mary Doe had any intention of paying her own husband a fee to represent

her, regardless of the outcome of the due process hearing in this case.

Petitioners seek to extend the reasoning of the Court of Appeals to an absurd end when they contend that, applying that reasoning, any attorney whose independence might be in question risks being denied fees should he or she prevail in an IDEA proceeding. (Pet. 18-19.) The Court of Appeals nowhere suggests an "objectivity" or "independence" test in ascertaining a litigant's entitlement to attorneys' fees. It simply concluded that a parent of a special education student was prohibited from seeking attorneys' fees. This clear and certain bright line test is neither unreasonable nor unfair, given that a parent needs no incentive to defend his or her child when he or she perceives that child is disadvantaged by a public school special education decision.

III.

In order to warrant granting the Petitioners' Petition in this case, this Court must first determine whether or not the issue is deemed worthy of review. One criterion frequently applied by this Court to determine such "cert-worthiness" -- the existence of a conflict in the Circuit Courts of Appeals -- is simply not present here. To the contrary, Petitioners concede that no other federal appeals court has squarely addressed the issue facing the Court in this case. (Pet. 17.) Indeed, the only other court of appeals that has addressed a similar issue -- i.e., whether an attorney-litigant may recover attorneys fees in his own cause, in that case a Freedom of Information Act lawsuit -- reached the very same result. In Burka v. United States Department of Health and Human Services, 142 F.3d 1286 (D.C. Cir. 1998), the Court of Appeals for the D.C. Circuit expanded Kay to include work performed by a pro se attorney-litigant on behalf of an "undisclosed client," or "work performed by other attorneys on the case where the other attorneys worked

in the attorney-litigant's law firm." 142 F.3d at 1292 (Pet. 17).

Petitioners' intimation as to the existence of a conflict between the Fourth Circuit and the Ninth Circuit (Pet. 10-12) over the extent to which exceptions may be made to the general rule awarding attorneys' fees to prevailing IDEA claimants is not only misplaced, but highly misleading. Both cases cited by the Petitioners -- Collins v. Chandler Unified School District, 644 F.2d 759 (9th Cir. 1981), and Abu-Sahyun v. Palo Alto Unified School District, 843 F.2d 1250 (9th Cir. 1988) -- **predated** this Court's decision in Kay, *supra*. In any event, the Abu-Sahyun case involved a question of fairness in denying attorneys' fees to a litigant who had, in fact, hired independent outside counsel, based upon the lower court's refusal to retroactively apply the then recently-enacted fee-shifting provision of the statute to a prevailing party.

Since this Court's ruling in Kay, *supra*, only 2 courts, besides the Court of Appeals in the case presently before this Court, have ruled on the subject at all in an IDEA case. In both cases, the courts ruled consistently to reject the fee petition of parent-attorneys on behalf of their children. One such case was the Maryland U.S. District Court's ruling in Rappaport v. Vance, *supra*. The other decision was rendered by the Indiana Supreme Court in Miller v. West Lafayette Community School Corporation, 665 N.E.2d 905 (Ind. 1996). In reaching the very same result as that reached by the Court of Appeals in the instant case, the Indiana Supreme Court in Miller equally embraced this Court's concern in Kay, *supra*, that in all fee-shifting statutes, including IDEA, "[t]he statutory policy of furthering the successful prosecution of meritorious claims is better served by a rule that creates an incentive to retain counsel in every such case." 665 N.E.2d at 907, *citing* Kay, *supra*, 499 U.S. at 436-38, 111 S. Ct. at 1437-38.

In short, not a single federal district or appeals court has chosen to take issue with the applicability of this Court's

Kay decision to facts such as those presented in the case at bar. Rather, the Court of Appeals decision in this case is consistent with virtually identical rulings in the two reported cases to address this issue, Rappaport and Miller, *supra*. Thus, there is no conflict between the circuits warranting resolution by this Court.

Nor does this case present questions of constitutional import warranting this Court's time and attention. What we have in this case is merely a challenge by Petitioners to the reasonable interpretation by the District Court and Court of Appeals of statutory language. Less than 2 years ago — after both the Indiana Supreme Court's ruling in Miller, *supra*, and the District Court of Maryland decision in Rappaport v. Vance, *supra* — Congress reauthorized the IDEA. Public Law 103-392, 108 Stat. 3518 (1997). Cognizant of this line of cases, with its reauthorization of the statute Congress could surely have amended the provisions governing attorneys' fees and costs so as to acknowledge the right of parent-attorneys to nonetheless obtain such fees from public school systems upon prevailing on the merits of a due process dispute under IDEA. That Congress chose not to amend the statute in that respect no doubt reflects its satisfaction with the reasoning in both Miller and Rappaport, which logically applied this Court's rationale in Kay v. Ehrler, *supra*, to IDEA litigation initiated by parent-attorneys.

Particularly where, during a significant overhaul of the IDEA statute, Congress had the opportunity to amend the statute to address Petitioners' concerns, yet failed to do so, it is not the job of this Court to second guess congressional intent. To the contrary, Congress' willingness to leave the attorneys' fees provision contained in IDEA virtually unchanged in this regard reflects its effective endorsement of the reasoning of those pre-Reauthorization decisions. See Lindahl v. Office of Personnel Management, 470 U.S. 768, 783, n.15, 105 S. Ct. 1620, 1629, n.15 (1985); Albemarle Paper Co. v. Moody, 422 U.S. 405, 414, n.8, 95 S. Ct. 2362,

2370, n.8 (1975) ("Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it reenacts a statute without change."); Lorillard v. Ponds, 434 U.S. 575, 580-581, 98 S. Ct. 866, 869-870 (1978) ("[W]here, as here, Congress adopts a new law incorporating sections of a prior law, Congress normally can be presumed to have had knowledge of the interpretation given to the incorporated law, at least insofar as it affects the new statute.").

This thoroughly logical means of discerning congressional intent in the reenactment of a statute which retained language that was the subject of a dispute over interpretation was acknowledged by this Court in an attorneys' fee decision brought under yet another fee-shifting statute. In Fogerty v. Fantasy, Inc., 510 U.S. 517, 527, 114 S. Ct. 1023, 1030 (1994), this Court addressed statutory language contained in fee-shifting legislation similar to IDEA -- in that case, referring to Christianburg Garment Co. v. EEOC, 434 U.S. 412, 98 S. Ct. 694 (1978), Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5(k) -- which, like 20 U.S.C. § 1415(e)(4)(B), leaves the award of a "reasonable attorney's fee" within the sound discretion of the District Court. ("[T]he court **may** also award a reasonable attorney's fee to the prevailing party as part of the costs"; emphasis added.) Given that this Court had previously noted in Flight Attendants v. Zipes, 491 U.S. 754, 758, n.2, 109 S. Ct. 2732, 2735, n.2 (1989), that "fee-shifting statutes' similar language is a 'strong indication' that they are to be interpreted alike," the Court of Appeals' application of this Court's reasoning in Kay, *supra*, to the facts of this case, even though derived from a different statute, was both reasonable and consistent with this Court's intent.

There is clearly no need for this Court to dictate to the lower federal courts the manner in which they are to exercise their discretion under fee-shifting statutes such as IDEA so as to deny attorneys' fees to attorney-litigants who, either as *pro se* civil rights litigants or as parents of children

with special needs, need no incentive to serve as advocates under these laws. The Court of Appeals in this case reached this logical and sensible conclusion, which need not be disturbed by this Court.

CONCLUSION

The decision of the Court of Appeals does not constitute a departure from precedent, nor is there a conflict among the Circuits warranting Supreme Court review. Neither does the decision of the Court below reflect an unreasonable or unsupportable interpretation of the attorneys' fee provisions of IDEA; the Court simply applied this Court's interpretation of an analogous statute to the facts and circumstances of this case.

The issue herein is of importance only to the Petitioners and a handful of parent-attorneys of special education students whose efforts would be best spent securing the services of competent, truly independent counsel to represent the interests of their children in disputed proceedings under IDEA, rather than undertaking the representation of their own children (whether or not they have sufficient expertise in this highly specialized field) in hopes of reaping a substantial fee at the end of the legal process. This, of course, presents no reason for granting review. Indeed, it is noteworthy that not a single disability or children's rights group has seen fit to join the Petitioners as *amici curiae* either in the Court below, or before this Court.

For the reasons set forth above, we submit that the Petition for a Writ of *Certiorari* should be denied.

Respectfully submitted,

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